10/8/10 (1)

Christine Joyce

From: Steve Ledoux
Sent: Tuesday, October 05, 2010 8:53 AM
To: Christine Joyce
Subject: FW: Acton/GenSel - [redacted]

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Town Manager
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From: Stephen D. Anderson [mailto:SAnderson@AndersonKreiger.com]
Sent: Tuesday, October 05, 2010 8:51 AM
To: Steve Ledoux
Cc: Ryan D. Pace; Stephanie L. Banos
Subject: Acton/GenSel - Agenda Item for Friday

Steve:

At last night's BOS meeting, Terra asked Jim Okun whether the site is or could be a federal superfund site. While Jim indicated that the probability is very low, the Town can further protect itself with a very simple maneuver as part of the upcoming closing (if it goes forward): The Town could use a friendly "order of taking" as part of the transaction, thereby getting a defense to liability under the federal superfund statute. Under ATM 2010 Article 25, the Town has already authorized the use of eminent domain for this property, and it is a tool that has the added advantage of clearing title of any uncertainties that may be associated with the land. There is no effect on the Sellers and (other than following the statutory procedures) no other adverse complication of adding this into the closing documents.

I have asked Ryan to draft the requisite BOS vote for consideration on Friday. (It would need to be contingent on the STM passing the appropriation articles).

I am asking you to add to the agenda for Friday's meeting an item for "BOS Vote as to form of acquisition."

Here's the statutory defense:

Under the federal superfund statute, 42 USC 9607(b)(3), "**there shall be no liability** under subsection (a) of this section **for a person otherwise liable who can establish** by a preponderance of the evidence **that the release** or threat of release of a hazardous substance **and the damages** resulting therefrom **were caused solely by** ... (3) **an act or omission of a third party other than** an employee or agent of the defendant, or than **one whose act or omission occurs in connection with a contractual relationship**, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; ..."

Under the definition section of the statute, 42 USC § 9601(35)(A), **"the term 'contractual relationship'**, for the purpose of section 9607(b)(3) of this title, **includes**, but is not limited to, **land contracts**, deeds, easements, leases, or other instruments transferring title or possession, **unless** the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

...

(ii) **The defendant is a government entity which acquired the facility by** escheat, or through any other involuntary transfer or acquisition, or through **the exercise of eminent domain authority by purchase or condemnation.**

Steve

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